BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

KENNETH M. SAFFER	)	
Claimant	)	
	)	
VS.	)	
	)	
STAR CONSTRUCTION	)	
Respondent	)	Docket No. 1,030,669
	)	
AND	)	
	)	
CONTINENTAL WESTERN INS. CO.	)	
Insurance Carrier	)	

ORDER

Respondent requested review of the October 28, 2009 Award by Administrative Law Judge (ALJ) Brad E. Avery. The Board heard oral argument on February 2, 2010.

APPEARANCES

Michael C. Helbert, of Emporia, Kansas, appeared for the claimant. Nathan D. Burghart, Lawrence, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

When the hearing in this matter was convened, respondent announced that the medical expenses associated with this claim have been paid and need not be addressed in this appeal. The parties also agreed that for purposes of any permanent partial general (work) disability computation, claimant's actual wage loss is 100 percent.

The parties also acknowledge an evidentiary issue that must be resolved in advance of reaching the substantive issues presented in this appeal. At the regular hearing, respondent asked the ALJ if he would consider the claimant's preliminary hearing testimony. The ALJ announced that he would not consider either the testimony or the exhibits attached to the transcript, absent an agreement between the parties. Claimant

was unwilling to agree to their inclusion and therefore, the December 15, 2006 preliminary hearing transcript was not referenced by the ALJ in his Award, nor did he apparently review it in preparation of his Award. Respondent appealed the Award and in its brief to the Board, repeatedly referenced the preliminary hearing transcript[1] in support of its arguments.

Claimant filed a Motion to Strike asking the Board to disregard respondent's brief.[2] Respondent replied to this Motion arguing that K.A.R. 51-3-5a excludes only the medical records offered into evidence at a preliminary hearing, and does not compel the wholesale exclusion of the testimony offered during that proceeding.[3]

The Board has held that the exclusionary language within K.A.R. 51-3-5a applies only to those medical reports that are entered into evidence at the preliminary hearing and not to the testimony in the transcript itself.[4] Thus, the Board finds the ALJ's interpretation of the regulation is in error. Indeed, it flies in the face of the express language contained within the regulation. But, respondent did nothing to correct this error or preserve this issue at the Regular Hearing. And then on appeal respondent pressed ahead and repeatedly referenced evidence that was specifically excluded. This was improper. Furthermore, the Board may only consider the record considered by the ALJ.[5]

The Board finds that claimant's Motion to Strike should be granted and the record therefore shall not include the preliminary hearing transcript held on December 15, 2006, nor will it include the exhibits entered into evidence at that time. Moreover, the Board will not consider any reference to or argument based upon the testimony or the exhibits contained within that transcript.

As a result, the Board has considered the same record presented to the ALJ and itemized within the Award along with the stipulations taken at the Regular Hearing.

ISSUES

The ALJ found that the claimant suffered a series of personal injuries arising out of and in the course of his employment over a period of dates beginning July 17, 2006 and

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[1] Respondent's Brief (filed Jan. 4, 2010).

[2] Motion to Strike (filed Jan. 11, 2010).

[3] *Sicard v. Royal Caribbean Cruises, Ltd.*, No. 1,010,014, 2005 WL 3030746 (Kan. WCAB Oct. 19, 2005).

[4] *Id.*

[5] K.S.A. 44-555c(a).

continuing to August 10, 2006.[6] He awarded claimant a 14.5 percent functional impairment (which reflects an average of the impairment ratings offered by Drs. Bieri and Amundson) as well as a 67.25 percent work disability, a finding which is likewise an average of the task loss opinions offered by those same physicians which was then averaged with claimant's 100 percent wage loss. The ALJ declined to grant respondent a credit for 27 days of temporary total disability (TTD) benefits as he concluded claimant was entitled to all the TTD benefits he received. The ALJ also concluded that claimant was a full-time employee as that term is used in K.S.A. 44-511, therefore claimant's average weekly wage was $479.79.[7]

The respondent requests review of this Award and alleges a number of errors. First, respondent takes issue with the ALJ's conclusion that claimant established that he suffered a series of injuries while in respondent's employ. Respondent maintains that to the extent claimant suffered an injury, it occurred (by his own testimony) on July, 17, 2006 and that timely notice of that single acute injury was not given as required by K.S.A. 44-520.[8] Respondent further takes issue with the ALJ's finding with respect to wage and contends claimant's actual wages show him to be a part-time employee, earning $373.22 per week as provided by K.S.A. 44-511. Respondent also suggests the Award should be modified to more accurately reflect claimant's functional impairment of 10 percent, as Dr. Amundson opined. And although respondent concedes claimant is no longer employed and presently has a 100 percent loss, respondent contends the *Bergstrom*[9] analysis does not apply. Respondent argues that claimant retains the capacity to earn significant wages, particularly in light of the fact that job placement services were provided to claimant. Lastly, respondent asserts that it has overpaid claimant temporary total disability benefits by 27 days and should receive a credit or offset for that period.[10]

Claimant argues the ALJ's Award for compensation should be affirmed or, in the alternative, modified to increase the functional impairment to 19 percent permanent partial

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[6] The parties agreed that in the event the ALJ found claimant suffered a series of injuries, his date of accident was August 10, 2006. The parties also agreed that if there was a series of injuries, claimant provided timely notice as required by K.S.A. 44-520.

[7] The parties agreed that in the event claimant was found to be a full-time employee, his average weekly wage was $479.79.

[8] Respondent concedes it received notice on August 17, 2006, and if the Board finds that claimant did establish a series of accidents occurred, respondent further concedes that claimant provided timely notice of a series culminating in an accident on August 10, 2006.

[9] *Bergstrom v. Spears Manufacturing Company*, 289 Kan. 605, 214 P.3d 676 (2009).

[10] The ALJ's calculation of the Award erroneously overlaps payment of the temporary total disability benefits *and* permanent partial benefits.

disability (based upon Dr. Bieri's testimony) and to reflect a 71.2 percent work disability (based upon a 100 percent wage loss and a 42.4 percent task loss).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein[11], the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant was employed by respondent as a laborer, performing heavy work "pretty much" every day[12] and was paid $12 per hour. According to claimant, he was expected to work 40 hours per week or more "if needed".[13]

There is no serious dispute that claimant injured himself on July 17, 2006 while lifting a trowel machine. This is a task claimant is expected to do and there is no evidence within the file that would suggest that claimant was not performing the activity which he says led to his immediate onset of pain. Claimant testified that he felt or heard a pop in his low back but continued to work that day and the days that followed. Claimant indicated that he felt soreness in his back the next day, but as he continued to perform his regular work duties setting forms, grading rock, tying rebar and finishing off concrete, and began to notice an increase in his symptoms. Claimant also testified that he told Jeff Herrick, the owner of company, "the very next day" of his injury.[14] In the days and weeks that followed claimant said he had to leave work early several times due to pain in his back.[15]

Over time, claimant says his condition worsened. According to claimant, on August 10, 2006, three hours into his shift, the pain became unbearable and he told his supervisor that he had to leave. This was claimant's last day of work for respondent.

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[11] As noted earlier, the record to be considered by the Board does not include the preliminary hearing transcript or those portions of respondent's brief to the Board referencing that transcript or the exhibits entered into evidence at that hearing.

[12] R.H. Trans. at 13.

[13] *Id.* at 15.

[14] *Id.* at 10.

[15] *Id.* at 10-11.

Shortly after leaving work on August 10, 2006, claimant made an appointment to see a chiropractor.[16] Then on August 17, 2006,[17] claimant sought treatment at the Emergency Room at Newman Memorial Hospital in Emporia, complaining of low back and leg pain. It appears that claimant was diagnosed with a herniated disc at L5-S1.

Claimant eventually found his way to Dr. Glenn Amundson and had surgery on April 17, 2006 to correct a herniated disc. Claimant had a reherniation and underwent a second surgery on October 2, 2007. A third surgery followed in June 2008 to remove some stitches that were causing complications.

Two physicians testified about claimant's impairment and task loss. Dr. Amundson, the treating physician, testified that claimant had a herniation at L5-S1, evidence of a bulging disc at L4-5 along with S1 radiculopathy, a condition that required multiple surgeries. He concluded that claimant's condition was caused by his work activities and that by continuing to work, claimant continued to exacerbate his condition.[18]

Dr. Amundson testified that claimant's condition fell within category III of the DRE's contained within the 4th edition of the *Guides* and therefore rated claimant at 10 percent permanent partial disability to the whole body.[19] He also testified that claimant lost the ability to perform 10 of the 33 tasks (30 percent) identified by Lindahl.[20] Dr. Amundson assigned restrictions which limited his ability to lift nothing more than 50 pounds and compelled him to avoid provocative sustained postures or conditions including sustained forwarding bending as well as repetitive bending, pushing, pulling, twisting or lifting.[21]

Dr. Peter Bieri also examined claimant and like Dr. Amundson, diagnosed claimant with a disc herniation at L5-S1 with bulging at L4-5 and left S1 radiculopathy. However, Dr. Bieri testified that it was more appropriate to utilize the range of motion model in the *Guides* and assigned a total of 19 percent permanent partial impairment to the whole body.

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[16] These records are not in evidence as they were exhibits at the preliminary hearing which are not considered part of this record.

[17] The dates of this event are confused. At some points in the record it appears that claimant sought emergency treatment on August 13th, but at other points the date of service is August 17th. This is further complicated by the fact that the actual records generated during that visit are not in evidence. In any event, the actual date of service is irrelevant in light of the Board's ultimate factual findings.

[18] Amundson Depo. at 28.

[19] *Id.* at 13; American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*, (4th ed.). All references are to the 4th ed. of the *Guides* unless otherwise noted

[20] This figure represents the corrected total task loss. Originally another job was identified and increased the total number of tasks to 33.

[21] Amundson Depo. at 14.

This figure is comprised of 13 percent for the surgeries, pain and rigidity, an additional 5 percent for range of motion deficits and 2 percent for radiculopathy.[22] Dr. Bieri also testified that claimant had lost the ability to perform 13 of the 33 tasks (39 percent) identified by Mr. Lindahl.[23]

After considering the evidence outlined above, the ALJ found that claimant established a series of injuries that culminated in an accident on August 10, 2006. The Board has considered the same evidence and finds the ALJ's finding should be affirmed. While it is certainly true that claimant recalls a very specific incident on July 17, 2006, he nevertheless continued to work at his normal work duties performing heavy construction work. He testified about how his symptoms continued to worsen over time and became overwhelming as of August 10, 2006. Dr. Amundson testified that claimant continued to aggravate his condition during this period of time. Thus, the Board concurs with the ALJ's analysis that claimant sustained a series of injuries which culminated in an accident on August 10, 2006.[24]

The ALJ concluded claimant was as full-time worker and that his average weekly wage was $479.79. This finding is fully supported by the evidentiary record. Although respondent persists in its argument that claimant was not a full-time worker, that argument is wholly without support. The only evidence within this record is the claimant's testimony at the regular hearing that he was earning $12 per hour and expected to work 40 hours a week, or more if needed. Thus, the ALJ's conclusion as to average weekly wage is affirmed.

The ALJ also declined to allow any offset or credit for 27 days of TTD benefits it maintains was overpaid. As noted by the ALJ:

> Respondent's allegation that it overpaid for temporary total benefits is impliedly based upon the assertion claimant would have been found to be at maximum improvement had he not missed appointments with Dr. Amundson in November and December of 2008. The termination of compensation must be based upon "an unreasonable refusal of the employee to submit to medical or surgical treatment." The only evidence before the Court regarding the reason for claimant's failure to attend his appointments is the proffer by claimant's attorney that claimant was not advised of at least one of them.[25]

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[22] Bieri Depo. (May 21, 2009), Ex. 2 at 6 (IME Report dated Feb. 17, 2009).

[23] *Id.* (June 25, 2009) at 5-6.

[24] As noted earlier, respondent stipulated that if claimant was found to have sustained a series of accidents, August 10, 2006 was the appropriate accident date and that notice was timely.

[25] ALJ Award (Oct. 28, 2009) at 4.

The ALJ went on to find that claimant was entitled to the TTD benefits paid and no credit or offset was allowed.

The Board has reviewed Dr. Amundson's records and notes that while he "anticipated" claimant would be found at maximum medical improvement as of November 24, 2008, claimant did not appear on that date. There are musings in the record that would suggest that claimant was not advised of that appointment but was ultimately released on December 30, 2008. In any event, there is no indication that claimant actually achieved maximum medical improvement until December 30, 2008. Based upon this record his entitlement to TTD benefits continued to December 30, 2008 and therefore, the ALJ's conclusion is affirmed.

The ALJ found that claimant's functional impairment was 14.5 percent, a figure that represents an average of the two functional impairments assigned by Drs. Bieri and Amundson. The ALJ seemed to believe that both physicians were equally persuasive and found no reason to accept one opinion over the other. After considering the record as a whole, the Board finds this approach is reasonable and is therefore affirmed. Claimant's functional impairment is 14.5 percent to the whole body.

When, as here, an injury does not fit within the schedules of K.S.A. 44-510d, permanent partial general disability is determined by the formula set forth in K.S.A. 44-510e(a), which provides, in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. **The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.** In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. **An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.** (Emphasis added.)

Based upon recent case law,[26] it is now clear that the determination of a claimant's permanent partial general (work) disability under K.S.A. 44-510e(a) is a simple mathematical calculation involving two components - wage and task loss.[27] The principle of "good faith"[28] is no longer part of the court's analysis. Thus, there is no need to consider why claimant is no longer employed or whether claimant should have taken steps to obtain subsequent employment.[29] The finder of fact need only concern itself with a comparison between a claimant's preinjury average weekly wage and the actual postinjury wages.

Respondent's brief[30] asserts a rather lengthy argument which advocates an exception to the ruling expressed in *Bergstrom.* Distilled to its essence, respondent contends the facts of this case are distinguishable from *Bergstrom* as unlike the claimant in *Bergstrom*, this claimant failed to attempt to return to work following his injury. *Bergstrom* stands for the proposition that this distinction is irrelevant.

Respondent also argues that *Bergstrom* compels an absurd result in those situations (as is alleged to have occurred here) when a claimant voluntarily stops working following an injury and obtains a work disability award premised upon a 100 percent wage loss pursuant to K.S.A. 44-510e(a) regardless of the claimant's ability to earn wages. According to respondent, the post-award statute governing modifications of awards, K.S.A. 44-528 contains language that contemplates consideration of a claimant's capacity to earn wages.[31] Thus, respondent argues it makes no sense to disregard a claimant's capacity to earn wages (or stated another way, his good faith in attempting to find appropriate postinjury employment) when considering the claim for purposes of the original Award, only

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[26] *Bergstrom v. Spears Manufacturing Company*, 289 Kan. 605, 214 P.3d 676 (2009).

[27] *Id.*

[28] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995); *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[29] Respondent provided claimant with job placement services through Karla Schroeder. Although admirable, this evidence is, in light of *Bergstrom*, irrelevant in this case.

[30] Respondent's Brief at 17-19 (filed Jan. 4, 2010).

[31] K.S.A. 44-528(b) provides as follows:

> (b) If the administrative law judge finds that the employee has returned to work for the same employer in whose employ the employee was injured or for another employer and is earning or is capable of earning the same or higher wages than the employee did at the time of the accident, *or is capable of gaining an income from any trade or employment which is equal to or greater than the wages the employee was earning at the time of the accident*, . . . the administrative law judge may modify the award and reduce compensation or may cancel the award and end the compensation.

to then consider that very same evidence when faced with a request for a post-award modification. As respondent notes, "[t]his creates a situation in which, contrary to reducing litigation and promoting judicial economy, more litigation would actually be created as respondents will become obligated to file for review and modification hearings so as to address the "good faith" issue that was not addressed in the initial award."[32] The Board has considered respondent's argument and finds that K.S.A. 44-510e would control in this matter over the general language in K.S.A. 44-528. Thus, the Board concludes that the standard for determining a claimant's work disability during an original proceeding as well as for purposes of a review and modification request is the same. In either instance, good faith is irrelevant under present law. The definition of permanent partial disability remains the same. Thus, the test is claimant's actual wage earnings, post award, and not his capability to earn the same or higher wages.

The Board acknowledges the perceived inconsistency in the language as between K.S.A. 44-510e(a) and K.S.A. 44-528 and notes respondent's frustration, but must follow Kansas Supreme Court precedent. Accordingly, claimant's wage loss is (pursuant to the parties' agreement) 100 percent. As for his task loss, the ALJ assigned a 34.5 percent, indicating this was an average of the task loss opinions offered by Drs. Bieri and Amundson. The Board adopts the ALJ's reasoning on this particular issue. Accordingly, claimant's work disability is 67.25, the figure found by the ALJ.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Brad E. Avery dated October 28, 2009, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of March 2010.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

[32] *Id.* at18.

c: Michael C. Helbert, Attorney for Claimant
Nathan D. Burghart, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge